American Restoration: An Article V Proposal

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Introduction

In American constitutional jurisprudence, the People are sovereign. The People ordained and established government, and government may not usurp the power which brought it into existence. What, then, is the constitutional status of government policies which alter, replace, or destroy the People? Moreover, are there any observable indicators that the People are being altered, replaced, or destroyed? And if such processes are constitutionally dubious, and are occurring, what should be done?

This paper answers these questions using empirical evidence, history, legal opinions, and the Constitution's text. It argues that policies which alter, replace, or destroy the People are wholly illegitimate and unconstitutional. Lengthy historical analysis of the long-held, consensus view regarding the original conception of the People is provided; and it is determined that the People formed and maintained their government along nationalist lines, placing particular emphasis on their shared ancestral heritage. Evidence is provided which indicates that demographic policies are currently threatening to reduce the People to a minority status—within the coming decades—in the country that is their constitutional birthright. It suggests the People may prevent this result by undertaking a political restoration and reasserting their rightful claim to sovereignty and primacy within the American body politic. Finally, it proposes changes to Article V, in the form of an additional section, as a means of entrenching this restoration and helping to ensure that such a struggle is never again needed to prevent similar constitutional evils.

Popular Sovereignty and Constituent Power in the American System

One potentially overlooked function of constitutions is in entrenching an exclusionary definition of the nation.[1] Thus, according to Ginsburg:

> In some polities, constitutions reflect and sometimes even create a shared consciousness, and so overcome regional and ethnic divisions. . . . The symbolic or expressive function of constitutions emphasizes the particularity of constitution-making. It is We the People that come together, and so the constitution embodies our nation in a distinct and local way different from other polities.[2]

Understanding this function is required to correctly understand American constitutional jurisprudence due to the importance of popular sovereignty within the American constitutional framework.[3] This principle was taken for granted to such a degree that, at the time of the Constitution's drafting, a proposal by James Madison to prefix the Preamble with a declaration stating that "the people have an indubitable, unalienable, and indefeasible right to reform or change their government" was deemed "redundant" and rejected "given the broad meaning of the Preamble itself."[4] Furthermore, contra Amar, the Preamble explicitly acknowledges that the Constitution is the People's creation, rather than the People being a creation of the Constitution.[5] Therefore, in addition to encapsulating the principle of popular sovereignty, the Preamble incorporates the closely related principle of constituent power, i.e., the power to bring (or that brings) the Constitution into existence.[6] Moreover, the principles of popular sovereignty and

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[1] Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L. J. 225, 237–38 (2013) (stating that "Constitutions may . . . express values with the aspirational or functional purposes of self-definition and nation building."). This paper utilizes Gat and Yakobson's definition of "nation," and considers the nation to be coterminous with "the People." *See* AZAR GAT WITH ALEXANDER YAKOBSON, NATIONS: THE LONG HISTORY AND DEEP ROOTS OF POLITICAL ETHNICITY AND NATIONALISM 18 (2012) (defining "nation" as a population with a sense of shared kinship, culture, common identity, history, and fate, that is either politically sovereign or actively striving to achieve political self-determination and self-government). *See also* CARL SCHMITT, CONSTITUTIONAL THEORY 127 (Jeffrey Seitzer, ed. & trans., 2008) (noting that "[n]ation and people are often treated as equivalent concepts" but that "[nation] denotes, specifically, the people as a unity capable of political action, . . . while the people not existing as a nation is somehow only something that belongs together ethnically or culturally, but it is not necessarily a bonding of men existing politically.").

[2] Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law* 118 (Univ. Chi. Pub. L. & Legal Theory, Working Paper No. 331, 2010).

[3] Akil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 89, 105 (Sanford Levinson ed., 1995) (stating that "the Founders themselves [indubitably] recognize[d] the Preamble as a textual declaration of popular sovereignty").

[4] *Id*. at 106.

[5] According to Amar, "the Constitution formed previously separate state peoples into one continental people—Americans!" *Id*. at 104. However, the Preamble declares "We the People of the United States, in Order to form a more perfect Union, . . . and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl. If the People inaugurated the Constitution, the People must have existed before the Constitution. *See also* THE FEDERALIST NO. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961) ("To all general purposes we have uniformly been one people").

[6] *See generally* Renato Cristi, *Carl Schmitt on Sovereignty and Constituent Power*, *in* LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM 179, 179–92 (David Dyzenhaus ed., 1998) (explaining constituent power's "conceptual kinship with the notion of sovereignty"). S*ee also* William Partlett, *The American tradition of constituent power*, 15 INT'L J. CONST. L. 955, 955 (2018) ("It is an axiom of democratic constitutional theory to say that 'the

constituent power were immediately reaffirmed after ratification via the Ninth and Tenth Amendments, which recognize that all rights and powers which have not been delegated to the federal government are "retained" and "reserved" by the People.[7] Moreover, these dual, interrelated principles have been consistently affirmed by the U.S. Supreme Court.[8]

The sovereign People's creation of the Constitution through the exercise of their constituent power has been explained in contractual terms.[9] These contractarian theories emphasize the Constitution's role in limiting the power of the constituted state.[10] According to Versteeg & Zackin, "[t]hose who conceptualize constitutionalism as a form of contracting describe the people as a 'principle,' which, in creating a representative government, has employed 'agents' to better realize its ends."[11] Whether or not viewing the Constitution as a contract is a particularly apt analogy,[12] this subsidiary principle-agent analogy properly expresses the hierarchical relationship between the sovereign, dominant People and their constituted, subservient

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people' hold the sovereign 'constituent power' to remake their constitutional order through specialized constitution-making bodies that exist outside the normal legal system.")

[7] U.S. CONST. amends. IX, X; s*ee also* Partlett, *supra* note 6, at 956 ("Constituent power in the United States is textually grounded in . . . the Preamble, Ninth, and Tenth Amendment of the US Constitution."); Amar, *supra* note 3, at 106–07.

[8] *See, e.g.*, Chisholm v. Georgia, 2 U.S. 419, 470–71 (1793) (""[T]he people, in their collective and national capacity, established the present Constitution . . . in establishing it, the people exercised their own rights, and their own proper sovereignty"); Marbury v. Madison, 5 U.S. 137, 176 (1803) ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."); Carter v. Carter Coal Co., 298 U.S. 238, 296 (1936) ("[T]he Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks."); Afroyim v. Rusk, 387 U.S. 253, 257 (1967) ("In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."); Buckley v. Valeo, 424 U.S. 1, 14 (1976) (relying on the presumption that the United States is "a republic where the people are sovereign"); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 794 (1995) (acknowledging "the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government.") (citing Powell v. McCormack, 395 U.S. 486, 541 n. 76 (1969)); Gamble v. United States, 587 U.S. 678, 688 (2019) ("[O]ur Constitution rests on the principle that the people are sovereign").

[9] *See* Rozann Rothman, *The Impact of Covenant and Contract Theories on Conceptions of the U.S. Constitution*, 10 PUBLIUS 149, 160 (1980) (stating that the Founders' deference to popular sovereignty "vitiated any grant of inherent power to the government" and that "[a]s the contract made clear, all governmental power was delegated and . . . a complicated representative structure set conditions for the exercise of power.").

[10] *Id*. ("These conditions [for the exercise of power by the government] constrained the exercise of power and reinforced dependence on the core notions of covenant, mutual obligation, reciprocity, and equality.").

[11] Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 658.

[12] *Compare* Letter from Thomas Jefferson to Edmund Randolph (Feb. 15, 1783) *in* 6 THE PAPERS OF THOMAS JEFFERSON, May 21, 1781–Mar. 1, 1784, at 246 (Julian P. Boyd, ed., Princeton University Press 1952), https://founders.archives.gov/documents/Jefferson/01-06-02-0228 ("[I]f the term *social contract* is to be forced from theoretical into practical use, I shall apply it to all the laws obligatory on the state, and which may be considered as contracts to which all the individuals are parties.") (emphasis in original), *with* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 352 (1833) (arguing that there is nothing in the Constitution "intimating it to be a compact, or in anywise providing for its interpretation, as such.").

government.[13] Utilizing this principal-agent analogy in the state constitutionalism context, Marshfield observes that "[b]ecause . . . agents derive their authority entirely from the existing constitution, they implicitly lack the authority to destroy or replace the source of that power."[14] There is no apparent reason why this implicit limitation should not also bind those agents to whom authority is granted under the U.S. Constitution. Furthermore, given the distinction between constituent power and constituted power[15] (along with the foundational principle of popular sovereignty), the ultimate source of the constituted power is the sovereign People's constituent power. Thus, it stands as an incontrovertible truism that the government lacks the authority to destroy or replace the People and may not "dissolve the people and elect another."[16]

The implicit prohibition against the constituted, subservient government replacing or destroying the ultimate source of its power—the sovereign People—is more encompassing than a mere prohibition against usurping the People's claim to sovereignty.[17] To further illustrate the obviousness of this proposition, a thought experiment may be beneficial. The Foreign Emoluments Clause prohibits any person "holding any Office of Profit or Trust" in the United States government from "accept[ing] . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" *unless* they receive "the Consent of the Congress."[18] Let us suppose that the government of a powerful, wealthy, and populous country, such as the People's Republic of China (P.R.C.), promises a supermajority of Congress wealth beyond their wildest

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[13] *See supra* note 8. *See also* Geer v. Connecticut, 161 U.S. 519, 529 (1896) (stating that a state government's powers over the common property in wildlife "is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people," and thus "for the purpose of exercising this power, the state, . . . represents its people, and the ownership is that of the people in their united sovereignty."(citing Martin v. Waddell's Lessee, 41 U.S. 367 (1842)), *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322 (1979).

[14] Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. UNIV. L. REV. 65, 79 (2019).

[15] Luigi Corrias, *Populism in a Constitutional* Key, 12 EUR. CONST. L. REV. 6, 15 (2016) (describing the nation as the "bearer" of constituent power, whereas "the constitution, legislature, executive, and judiciary" which "ultimately derive their power from the nation" are the constituted power).

[16] Bertolt Brecht, *The Solution* (1959), *reprinted in* BERTOLT BRECHT POEMS 1913-1956, 440 (John Willett and Ralph Manheim, eds., Methuen 1976).

[17] In a republic such as the United States, where the political system does not feature a popular referendum mechanism, the People possess only a claim to sovereignty and may only normally exercise it in a very indirect manner through elections. Policy decisions are delegated to the constituted government. Of course, the right to change their government by extraordinary or extralegal means is retained by the People. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("it is the Right of the People to alter or to abolish [government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."). However, it is undeniable that revolutionary means are generally difficult for the People to effectively wield, particularly when they remain unorganized or when the "abuses and usurpations" that they are subject to are deemed by the vast majority of the People to be tolerable (albeit still objectionable). *See id*. ("[A]ll experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."). The upshot of this power dynamic is that so long as the juiciest fruit of political power—the policy-making apparatus—remains within the privileged hands of the constituted government's officials (and, by extension and more importantly, any minoritarian special interests that are disproportionately responsible for those officials' electoral successes), those officials have little incentive to disturb the constitutional order by disputing the People's nominal claim to sovereignty. That is especially true when the constituted government's policy-making apparatus is not restrained to prevent officials and their minoritarian backers from bringing about a slow and steady usurpation of the People's sovereignty *sub silentio*.

[18] U.S. CONST. art. I, § 9, cl. 8.

dreams if they would only permit all emoluments to any government official. Our hypothetical Congress is a particularly disloyal and flagrantly venal one and so opportunistically permits this exception. The P.R.C.'s government then cuts very substantial checks not only to their new bought-and-paid-for Congress, but also to top officials in our just as mercenary executive and judicial branches. However, like all political "donors," the P.R.C. has a few requests to accompany their support for "our" leaders. First, they request full U.S. citizenship not only for P.R.C. citizens, but for the entire population of the BRICS bloc—which includes Brazil, Russia, India, the P.R.C., South Africa, Iran, Egypt, Ethiopia, and the United Arab Emirates—around 3.5 billion people.[19] "Our" government complies. Then, the P.R.C. requests that the United States facilitate the migration of roughly one billion of these people to America. Again, "our" government complies. Finally (and at this point the people that were previously the entirety of the American people are thoroughly irritated by these changes), the P.R.C. requests that BRICS military forces be allowed to work with the U.S. military to occupy unruly areas of the country. Once again, "our" government complies.[20] BRICS forces soon neutralize the various malcontent groups throughout the country; and, bolstered by the newly imported electorate, almost all incumbent government officials are reelected.

All this has occurred without any revision to the written constitution. Elections, as indicated, still regularly occur. We can imagine that our leaders would still proclaim that the People rule. But is what has just been described constitutional? If popular sovereignty is more than a mere parchment promise and a rhetorical sop to the *hoi polloi*, then this hypothetical scenario must surely qualify as a perverse inversion of a constitutional order based on popular sovereignty. The constituted government has eliminated the power of the People by opening its gates to a foreign multitude which dwarfs the People and a foreign army which has subjugated the People. Such a result could hardly be described as anything but an unconstitutional usurpation whereby the agent has assumed the principle's authority by inviting a hostile takeover. Moreover, if we take popular sovereignty seriously, then this degradation cannot be cured by the government merely affixing the label of citizen to these invaders.

Of course, this exact scenario is clearly fantastical.[21] However, a conceptually similar usurpation has been perpetrated by the constituted government, and the People are well on their

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[19] *Brics: What is the group and which countries have joined*, BBC (Feb. 1, 2024), https://www.bbc.com/news/world-66525474.

[20] Given what our hypothetical government has permitted thus far, why would they not also permit this? After all, those Chinese, Ethiopian, and Indian soldiers are just as much American citizens as any Marine born in the U.S.; and, more importantly, insurrection is brewing! Furthermore, such an action might even be given a fig leaf of textual support within the Constitution itself. *See* U.S. CONST. art. IV, § 4 (requiring the federal government to "guarantee to every State in this Union a Republican Form of Government, and . . . protect each of them against . . . domestic Violence."). That section's requirement that the federal government protect the states "against Invasion" could be argued to be inapplicable since, as previously stated, these foreign troops are also U.S. citizens, and it may be the case that, by definition, no one can invade a country they are a citizen of.

[21] *But see* Karl Evers-Hillstrom, *Most expensive ever: 2020 elections cost $14.4 billion*, OPEN SECRETS (Feb. 11, 2021, 1:14 PM), https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/ ("Political spending in the 2020 election totaled $14.4 billion, more than doubling the total cost of the record-breaking 2016 presidential election cycle."); Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSPECTIVES ON POLS. 731, 742 (2009) (noting that in election financing "the vast preponderance of money, some 80 percent of it, has generally come from a small 'donor class' constituting roughly one-tenth of 1 percent of the population"). It will

way to being replaced and having their sovereignty extinguished. To validate this proposition, the nature of the People when they exercised their sovereign, constituent power to ordain and establish the Constitution must be explained.

The Historic American Nation

In The Federalist No. 2, future inaugural Chief Justice John Jay sought to answer the question "whether it would conduce more to the interest of the people of America that they should, to all general purposes, be one nation, under one federal government, or that they should divide themselves into separate confederacies."[22] Jay, an ardent nationalist, vociferously argued for political unity, partly basing his argument on the benefits such unity would bring to the People given the geographical richness and contiguousness of the United States and its frontier lands which were ripe for agricultural and commercial exploitation.[23] However, Jay's call for political unity was based on far more salient facts than mere geography. Prefiguring Schmitt, Jay proposed that Americans must be politically united because they possessed what Schmitt would later call "substantial equality" or "homogeneity."[24] Jay observed that Americans were:

> [A] people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.[25]

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be shown that domestic minoritarian special interests are currently perpetrating similar usurpations. Furthermore, there may come a time when the United States is no longer a world superpower, and wealthy special interests abandon the country or become destitute. In that scenario, our elected officials may become far more susceptible to foreign bribery. The Foreign Emoluments Clause is in the Constitution for a reason. *See* THE FEDERALIST NO. 22, at 149 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[H]istory furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments.").

[22] THE FEDERALIST NO. 2, *supra* note 5, at 37.

[23] *See id*. at 38.

[24] SCHMITT, *supra* note 1, at 258–59 (arguing that "[p]olitical democracy . . . cannot rest on the inability to distinguish among persons," but can only survive "on the quality of belonging to a *particular people*. This quality of belonging to a people can be defined by very different elements (ideas of common race, belief, common destiny, and tradition). The *equality* . . . thus orients itself *internally*" and when democracy produces a state wherein citizens possess equal rights and obligations "democratic equality is a *substantial equaility*.") (emphasis in original). *See also* Heiner Bielefeldt, *Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism*, *in* LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM 23, 27 (David Dyzenhaus ed., 1998) ("What ultimately counts in a genuine democracy, [Schmitt] says, is the sovereign authority of the collective unity of the people, a unity facilitated by . . . 'substantial homogeneity.'").

[25] THE FEDERALIST NO. 2, *supra* note 5. Thus, Jay conceived of Americans as possessing *all* of the "different elements" that Schmitt suggested would provide the democratic "quality of belonging to a particular people." *See supra* note 24. However, as will be seen shortly, the most enduring and legally important of these elements would be the fact that Americans were "descended from the same ancestors," i.e., that Americans belonged to the White race. Indeed, it is almost certain that Jay had in mind a White, or pan-European, identity (as opposed to a British or Anglo-Saxon identity) when he wrote that Americans shared a common ancestry because Jay was himself of French Huguenot and Dutch descent (Hamilton was also partially of French Huguenot descent), a fact that was oft remarked upon by his contemporaries. *See* Steven D. Griffin, The Effects of the Huguenot Diaspora on the American Revolution 149 (Oct. 6, 2016) (Master's Thesis, U.S. Army Command and General Staff College) (DTIC). Furthermore, this Huguenot heritage may have made Jay more open to the idea of basing American national identity on pan-European grounds.

After noting the unified character of America's geography and demography, Jay, with rhetoric that may strike the modern reader as reminiscent of 20th century "blood and soil" nationalism, connected the two unities, stating that "[t]his country and this people seem to have been made for each other."[26] Jay proffered further that America's present situation was divinely ordained, and that "it appears as if it was the design of Providence, that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties."[27] In The Federalist No. 2, Jay clearly conceives of Americans as a unified, politically sovereign population with a sense of shared kinship, culture, common identity, history, and fate; thus, under Gat & Yakobson's definition of "nation," American identity is of a national character.[28] It was this national character that formed the foundation of the rhetorical edifice through which Jay, Hamilton, and Madison defended the Constitution and advocated for its ratification by the sovereign People.[29] National unity was a "term" or a "material fact" upon which the "contract" was accepted by the People.

Even Thomas Jefferson, an individual commonly grouped with the Anti-Federalists,[30] undoubtedly viewed the nascent American republic as resting not merely on a national foundation, but upon a national foundation that was racial in nature. Despite being a slaveowner, Jefferson, in his *Notes on the State of Virginia*, clarified his belief that abolition was necessary to maintain America's republican spirit.[31] However, although Jefferson may have been (at least rhetorically) committed to abolition, he made no such commitments to integration and racial equality. To the contrary, Jefferson firmly believed that Black slaves, once freed, would have to be excluded from American society, lest the nation risk interracial conflict[32] and miscegenation.[33] Indeed, Jefferson's opinions on Blacks might be reasonably described as the most blunt—and even crude—of all the

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See id. at 149–50 (discussing the "collective, chameleon-like ability [of Huguenots] to successfully acculturate" into European groups).

[26] THE FEDERALIST NO. 2, *supra* note 5. Cf. Adolf Hitler, Speech "On National Socialism and World Relations" Delivered in the German Reichstag (Jan. 30, 1937), *in* CALVIN UNIV. GER. PROPAGANDA ARCHIVE, https://research.calvin.edu/german-propaganda-archive/hitler1.htm (last visited Oct. 19, 2024) (declaring that "[t]he main plank in the National Socialist program" is to establish a "folk community, rooted in the soil and bound together by the bond of its common blood.").

[27] THE FEDERALIST NO. 2, *supra* note 5.

[28] *See supra* note 1.

[29] *See also* THE FEDERALIST NO. 14, at 103–04 (James Madison) (Clinton Rossiter ed., 1961) (framing Americans as "members of the same family" who must "be fellow citizens of one great, respectable, and flourishing empire."); THE FEDERALIST NO. 22, *supra* note 21, at 152 ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.") (emphasis in original).

[30] *But see* Michael J. Faber, *Thomas Jefferson, Federalist*, 128 VA. MAG. HIST. & BIOGRAPHY 282, 283 (2020) (acknowledging that Jefferson "is easy to mistake for an Anti-Federalist," but nonetheless arguing that he "clearly and unequivocally favored ratification of the Constitution" and "offers considerable insight into the Federalist position.").

[31] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 168–69 (Frank Shuffelton, ed., Penguin Books 1999) (1785).

[32] I*d*. at 145 (arguing that if Blacks were made citizens, then racial differences "will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race.").

[33] *Id*. at 151 ("Among the Romans emancipation required but one effort. The slave, when made free, might mix with, without staining the blood of his master. But with us a second is necessary, unknown to history. When freed, he is to be removed beyond the reach of mixture.").

well-known Founders.[34] His views on American Indians were not much kinder.[35] For all that is made today of Jefferson's writing in the Declaration of Independence of the supposedly self-evident truth "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights,"[36] it is often forgotten that Jefferson, in the very same document, concluded his list of grievances against the Crown by castigating the British for having "endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions."[37] Regardless, Jefferson shared the leading Federalists' expansionist aims, and argued forcefully that disunity between the states should not be permitted to result in subnational secession, and that the United States "must be viewed as the nest from which all America, North and South is to be peopled."[38] Expansion was to be carried out on a purely monoracial and nationalist basis.[39] Under Jeffersonian grand strategy, to ensure a workforce for the burgeoning United States, and provide a steadily growing population with which to settle its ever-growing frontiers, emancipation and "deportation" of freed Blacks would occur "peaceably and in such slow degree as that the evil will wear off insensibly, and their place be pari passu filled up by free white laborers."[40]

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[34] *See, e.g., id*. at 145–51 (discussing perceived aesthetic, sensory, emotional, artistic and intellectual inferiorities of Blacks). *Notes on the State of Virginia* was a widely published book, and Jefferson felt no compunction about expressing these viewpoints publicly. Moreover, there is little evidence that contemporaries had any compunction with electing him to the presidency despite him publicly expressing these viewpoints. In other words, Jefferson was likely simply expressing the commonly held, noncontroversial racial worldview of contemporary Americans.

[35] *See id*. at 103–04 ("I know of no such thing existing as an Indian monument: for I would not honour with that name arrow points, stone hatchets, stone pipes, and half-shapen images . . . I think there is no remain as respectable as would be a common ditch for the draining of lands.").

[36] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)

[37] *Id*. at para. 29.

[38] Letter from Thomas Jefferson to Archibald Stuart (Jan. 25, 1786), *in* 9 THE PAPERS OF THOMAS JEFFERSON, Nov. 1, 1785–June 22, 1786, at 217 (Julian P. Boyd, ed., Princeton University Press 1954), https://founders.archives.gov/documents/Jefferson/01-09-02-0192.

[39] *See* Letter from Thomas Jefferson to James Monroe (Nov. 24, 1801), *in* 35 THE PAPERS OF THOMAS JEFFERSON, Aug. 1–Nov. 30, 1801, at 718 (Barbara B. Oberg, ed., Princeton University Press 2008), https://founders.archives.gov/documents/Jefferson/01-35-02-0550 (wherein Jefferson expresses desire that the country would "cover the whole Northern, if not the Southern continent with a people speaking the same language, governed in similar forms, & by similar laws" but writing that he could not "contemplate, with satisfaction, either blot or mixture on that surface").

[40] Thomas Jefferson, *Notes on Early Career (the so-called "Autobiography")* (Jan. 6–July 29, 1821), *in* 17 THE PAPERS OF THOMAS JEFFERSON, Retirement Series Mar. 1–Nov. 30, 1821, at 309 (J. Jefferson Looney et al., eds., Princeton University Press 2020), https://founders.archives.gov/documents/Jefferson/03-17-02-0324-0002. Jefferson's belief that emancipation should be followed by the removal of newly freed Blacks from the United States was shared by many of his contemporaries. The American Society for Colonizing the Free People of Color of the United States (ACS), was founded in 1816 "by a group of white elites including Reverend Robert Finley, Charles Fenton Mercer, Henry Clay, Daniel Webster, Bushrod Washington, Elias Caldwell, and Francis Scott Key" who were dedicated to freeing enslaved Blacks and then deporting them. *See* Morgan Robinson, *The American Colonization Society*, WHITE HOUSE HIST. ASS'N, https://www.whitehousehistory.org/the-american-colonization-society (last visited Oct. 20, 2024). ACS members, "an unusual mix of abolitionists and enslavers," all "agreed that free Black people would never be accepted as equals in the United States" and that Blacks and Whites "could not peacefully co-exist in society;" and thus, "the organization sought to create and settle a colony in West Africa to fulfill its mission." *Id*. Presidents Jefferson, Madison, and Monroe all supported the ACS politically, financially, or through their personal energies (Madison, for example, served as the ACS's third president from 1833 until his death in 1836). *Id*. Chief Justice John Marshall, who "feared slavery would split his state and country," was also a backer of the ACS. *See John*

But White nationalism was not merely the idiosyncratic worldview of Jefferson and the leading Federalists. As Chin & Finkelman show, "whether or not they supported slavery, a majority of [the Founders] unambiguously conceived of the United States as a White country."[41] To create this White country—and encourage its expansion—an appropriate immigration and naturalization policy was fashioned. Importantly, the Founders were not rabid nativists and understood the importance of permitting immigration.[42] One of Jefferson's grievances in the Declaration of Independence was that the Crown prevented the "population of these States" by obstructing immigration and failing to pass "Laws for Naturalization of Foreigners" in order to block American frontier expansion.[43] The Constitution itself permits Congress to "establish a uniform Rule of Naturalization."[44] Moreover, "everyone at the Convention would have understood that a 'uniform Rule of Naturalization' would be tied to race."[45] Thus, the 28th law passed by the first Congress—crucially, preceding the ratification of the Bill of Rights—was the Naturalization Act of 1790.[46] That act, promptly signed into law by President George Washington, limited naturalization to "any alien, being a free white person, who . . . is a person of good character" upon their "taking the oath or affirmation prescribed by law, to support the constitution of the United States."[47] Given the timing of the 1790 act, the Founders agreement that naturalization—the process by which foreigners could join the ranks of the People—should be the privilege of Whites only is important supplemental evidence (in addition to the writings of the leading Federalists and Jefferson) to support the characterization of "the People" referenced in the Preamble as belonging exclusively to the White race. At the very least, this history strongly suggests the Founders believed it was incumbent upon the constituted government to ensure that the White share of the population be preserved and grown. Moreover, although the 1790 act was eventually amended and superseded, the racial restriction on naturalization remained for more than 160 years.[48]

Marshall (1755-1835), WM. & MARY LIBRS., https://scrc-kb.libraries.wm.edu/john-marshall-1755-1835 (last visited Oct. 20, 2024).

[41] Gabriel J. Chin & Paul Finkelman, *The "Free White Person" Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WM. & MARY L. REV. 1047, 1048 (2024).

[42] However, this is not to imply that—aside from the racial restrictions—the Founders supported an unregulated immigration policy. Most, if not all, of the Founders would likely have understood that even European immigration could be dangerous if not properly circumscribed. *See, e.g.,* Alexander Hamilton, *The Examination Number VIII*, N.Y. EVENING POST, Jan. 12, 1802, *reprinted in* 25 THE PAPERS OF ALEXANDER HAMILTON, July 1800–Apr. 1802, at 495 (Harold C. Syrett, ed., Columbia University Press 1977), https://founders.archives.gov/documents/Hamilton/01-25-02-0282 (agreeing with Jefferson that "that foreigners will generally be apt to bring with them attachments to the persons they have left behind; to the country of their nativity, and to its particular customs and manners" and that there was a risk that they would lack "that temperate love of liberty, so essential to real republicanism;" and arguing further that the U.S. has "already felt the evils of incorporating a large number of foreigners into their national mass; it has served very much to divide the community and to distract our councils, by promoting in different classes different predilections in favor of particular foreign nations, and antipathies against others" but nonetheless stating that these observations were not a call "for a total prohibition of the right of citizenship to strangers, nor even for the very long residence which is now a prerequisite to naturalization, and which of itself, goes far towards a denial of that privilege").

[43] *See* THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

[44] U.S. CONST. art. I, § 8, cl. 4.

[45] Chin & Finkelman, *supra* note 41, at 1067.

[46] *Id*.

[47] Naturalization Act of 1790, ch. 3, 1 Stat. 103.

[48] *See* Ozawa v. United States, 260 U.S. 178, 192–93 (1922) ("In all of the naturalization acts from 1790 to 1906 the privilege of naturalization was confined to white persons . . . although the exact wording of the various statutes was not always the same."). In 1870, during the fervor of Reconstruction, the Senate voted narrowly (21-20) to insert

Along with the Founders, the basic foundational principle of White nationalism would continue to be respected and reinforced by American jurists for generations to come. Numerous antebellum court opinions relied on White nationalism as a guiding legal principle. In 1857, the Supreme Court, in an opinion written by Chief Justice Roger Taney, would rule that, under the U.S. Constitution, Blacks (and, presumably, all non-Whites) "had no rights which the white man was bound to respect."[49] Furthermore, as Chin & Finkelman show, Chief Justice Taney "was not alone in arguing for the importance . . . of the exclusively White nature of the political community," and numerous state and territorial court decisions came to similar conclusions.[50] Importantly, not all of these states and territories seceded and formed the core states of the Confederacy. For example, in 1853 the Supreme Court of the Territory of Oregon ruled that "[w]hatever militates against the true interests of a white population is inapplicable" in upholding the conviction of an American Indian for violating a provision of an 1834 act of Congress which designated Oregon as "Indian country" and prohibited the sale of liquor therein to Indians.[51] Despite Oregon having been substantially settled by Whites in the interim, and "[v]ery much of the act of 1834" being "clearly unsuited to the present condition of the country," the court reasoned that the provision against selling liquor to Indians should still be upheld because if that provision was "required in a country wholly inhabited by Indians," then there was even more necessity for the provision "where defenceless white persons, women and children, are exposed to the violence of drunken savages."[52] Similarly, in the same year, the Supreme Court of Pennsylvania opined in dicta that "[w]henever the white population, who settled this Commonwealth, . . . think proper to admit into political partnership either the black population of Africa or the red aborigines of America, they have a

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a provision into what would become the Naturalization Act of 1870 which would permit the naturalization of "aliens of African nativity and to persons of African descent." Chin & Finkelman, *supra* note 41, at 1102. Nonetheless, no other non-White group was permitted to naturalize, and (in addition to the practical difficulties barring the migration of Africans to the United States in the late 19th century) "[w]hile nominally favored in this way" U.S. immigration law "consistently discriminated against persons of African ancestry" until decades later. *Id*. at 1102 n.313. These laws would remain in effect until 1952 when "in part as a response to the Cold War and the integration of post-war Japan into the emerging western alliance, the United States eliminated all racial restrictions on naturalization, while at the same time continuing ethnic and racial restrictions on immigration through national origins quotas." *Id*. at 1110. There would not be "race neutrality [in] the immigration stream" until the passage of the 1965 Immigration and Naturalization Act (Hart-Celler Act) and the abolition of the national origins quota system. Gabriel J. Chin & Douglas M. Spencer, *Did Multicultural America Result from a Mistake - The 1965 Immigration Act and Evidence from Roll Call Votes*, 2015 UNIV. ILL. L. REV. 1239, 1241 (2015).

[49] Dred Scott v. Sandford, 60 U.S. 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Chin & Finkelman criticize Chief Justice Taney for ignoring "that free Black persons voted in a majority of the states ratifying the Constitution and in two of the three states admitted to the Union in the 1790s." Chin & Finkelman, *supra* note 41, at 1063. However, this fact is completely inapposite because Taney applied the U.S. Constitution in *Dred Scott*. Indeed, the conceded fact that Blacks could not vote in many states (in addition to the fact that most Blacks in the United States in 1857 were enslaved) *reinforces* Taney's argument that government was not "bound" to grant rights to Blacks (enslaved or free). As Chin & Finkelman themselves show, "[w]hile Connecticut enfranchised Black people at the Founding, this right disappeared with the adoption of the Connecticut Constitution of 1818, which granted the privilege only to 'white male citizen[s].'" *Id*., at 1090 n.241. The Connecticut example proves that, in the antebellum period, whatever rights Blacks, or any other non-Whites, possessed existed at the pleasure of the governments which granted them those rights, and could be revoked through regular amendment processes (or, if the rights were statutory in origin, through mere legislative change).

[50] Chin & Finkelman, supra note 41, at 1090.

[51] United States v. Tom, 1 Or. 26, 27 (1853).

[52] *Id.* at 27–28.

right to do so."[53] However, the court continued, "[u]ntil this be done, the negro and the Indian must be content with the privileges extended to them, without aspiring to the exercise of the elective franchise, or to the right to become our legislators, judges and governors."[54] The validation of White nationalism by territorial and state courts at both ends of the continent in the middle of the 18th century is unsurprising given how, three decades earlier, the Court, in an opinion by Chief Justice Marshall, gave judicial sanction to the conquest of the West by Whites in a race war.[55]

Not even the presidency of Abraham Lincoln and Reconstruction would bring White nationalism to an end. In fact, by modern standards, "the Great Emancipator" cannot be considered a racial egalitarian. It was Lincoln who said, in the fourth Lincoln-Douglas debate in Charleston, Illinois in 1858, that he was not "in favor of bringing about in any way the social and political equality of the white and black races" nor was he "in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people."[56] Lincoln justified these beliefs by pointing to "a physical difference between the white and black races" which he believed would "forever forbid the two races living together on terms of social and political equality."[57] Indeed, Lincoln "endorsed colonization [i.e., deporting freed Blacks] earlier in his life and even during his presidency."[58] In August, 1862, almost a year before the Battle of Gettysburg would mark the turning point of the Civil War, Lincoln invited "a committee of colored men" to the White House where he told them that Whites and Blacks "are different races" and "have between us a broader difference than exists between almost any other two races" which "is a great disadvantage to us both."[59] All of this belies Ackerman's assertion that, had it not been for his assassination, Lincoln would have "proudly signed" the Reconstruction acts his successor vehemently opposed.[60]

Like Lincoln, Justice John Marshall Harlan, "the Great Dissenter," must also be counted among the nationalists and racists of American history. In his famed dissent in *Plessy*, the first Justice Harlan goes to great lengths to make his (rather curious) view clear that "social equality"

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[53] Foremans v. Tamm, 1 Grant 23, 23 (Pa. 1853).

[54] *Id*.

[55] *See generally* Johnson's Lessee v. M'Intosh, 21 U.S. 543, 590 (1823) (arguing that "the tribes of Indians inhabiting this country were fierce savages, . . . [t]o leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible;" and thus, "Europeans were under the necessity . . . of enforcing [their] claims by the sword, . . . or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred").

[56] Abraham Lincoln, *Fourth Debate: Charleston, Illinois* (Sept. 18, 1858), *in* Mark E. Neely Jr., THE ABRAHAM LINCOLN ENCYCLOPEDIA (Da Capo Press 1982), https://home.nps.gov/liho/learn/historyculture/debate4.htm.

[57] *Id*. ("[I]nasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.")

[58] *See* Robinson, *supra* note 40.

[59] Abraham Lincoln, Address on Colonization to a Deputation of Colored Men (Aug. 14, 1862), *in* THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/address-colonization-deputation-colored-men (last visited Dec. 15, 2024). Lincoln also told his Black guests that American Whites "suffer from your presence" and that "[b]ut for your race among us there could not be war, although many men engaged on either side do not care for you one way or the other;" he concluded, "[i]t is better for us both, therefore, to be separated." *Id*.

[60] *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1767 (2007).

between the races was not at issue in *Plessy*[61] and that, regardless, Whites were "the dominant race"[62] in America. In one passage, Justice Harlan states that "[s]ixty millions of whites are in no danger from the presence here [in America] of eight millions of blacks" which, of course, raises the question of whether they would be in danger if the demographic situation were to be reversed.[63] Moreover, although Justice Harlan may have been a defender of certain Black rights,[64] he had no such commitment to equality when it came to Chinese.[65] Perhaps nothing else demonstrates the enduring relevancy of White nationalism in the American political fabric in the postbellum period than the fact that, nearly sixty years post-Appomattox, the Republican candidate in the 1924 Presidential election had, three years prior as the sitting Vice President, written an article in *Good Housekeeping* arguing that"[t]here are racial considerations too grave to be brushed aside for sentimental reasons" and that "[q]uality of mind and body suggests that observance of ethnic law is as great a necessity to a nation as immigration law."[66] His Democratic opponent, on the other hand, would in 1952 argue on behalf of the segregated school district in the first of the Brown v. Board of Education companion cases.[67] Thus, it would appear that generations after the Civil War and Reconstruction, Americans remained in broad agreement regarding the nationalistic nature of the constitutional order and the White race's position of primacy therein.

Of course, the most obvious reason why White nationalism maintained itself in American law and politics for more than a century and a half after ratification is the simple demographic fact that the United States was a supermajority White country. In defending their accurate characterization of the 1790 Naturalization Act as a "super-statute,"[68] Chin & Finkelman note that the act "helps explain why, for example, as late as 1960, more than 99 percent of Americans were

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[61] Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) (arguing that "social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box").

[62] *Id*. at 562.

[63] *Id*. at 560.

[64] *But see* Pace v. Alabama, 106 U.S. 583, 585 (1883) (where Justice Harlan joined a unanimous Court in upholding an Alabama anti-miscegenation law); Cumming v. Bd. of Ed. of Richmond Cnty., 175 U.S. 528, 545 (1899) (opinion by Harlan, J.) (upholding a segregated schooling scheme and ruling that "any interference on the part of Federal authority with the management of [state] schools cannot be justified except in the case of a clear and unmistakable disregard of rights").

[65] *See Plessy*, 163 U.S. at 561 (Harlan, J., dissenting) ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."); United States v. Wong Kim Ark, 169 U.S. 649, 707 (1898) (Fuller, C.J., dissenting) (Justice Harlan joining Justice Fuller's dissent which stated that "[n]ationality is essentially a political idea, and belongs to the sphere of public law" and argued that Wong Kim Ark, who was born in the U.S., should not be granted citizenship pursuant to the Fourteenth Amendment because his parents were Chinese subjects); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (Justice Harlan joining a unanimous court in upholding the Chinese Exclusion Act).

[66] Calvin Coolidge, *Whose Country is This?*, GOOD HOUSEKEEPING, Feb., 1921, at 14 ("Biological laws tell us that certain divergent people will not mix or blend. The Nordics propagate themselves successfully. With other races, the outcome shows deterioration on both sides.")

[67] Briggs v. Elliott, 342 U.S. 350 (1952).

[68] *See* William N. Eskridge, Jr. and John Ferejohn, *Super-statutes*, 50 DUKE L. J. 1215, 1216 (2001) (defining a super-statute as a law or series of laws that "(1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law" which goes "beyond the four corners of the statute.").

White or Black."[69] While this statement is true, it obfuscates the fact that in 1960 the country was 88.8 % White and had reached "peak Whiteness" in 1940 when the country was 89.8% White.[70] Remarkably, the United States became steadily more White after 1790, when the White population was only 80.7% of the country's total population.[71] Obviously, when evaluating the effectiveness of the 1790 act, given that the act's purpose was to make (or keep) the United States a homogenous White country, the percentage of Whites, standing alone, is a far more important statistic to relay than the percentage of Whites and Blacks together.

Regardless, as Chin & Spencer observe, the demise of racial immigration restrictions with the 1965 Hart-Celler Act (and one should also note, a massive increase in illegal infiltration[72] and the fact of differential birth rates[73]) has set the United States on a course to become a majority non-White country by 2043.[74] All of this has occurred despite the fact that the People, as originally conceived,[75] never asked to be made a minority,[76] and a significant portion of them are revolted

[69] Chin & Finkelman, *supra* note 41, at 1048.

[70] Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States,* 19 tbl. 1 (U.S. Census Bureau, Working Paper No. 56, 2002).

[71] *Id*.

[72] *See* AVIVA CHOMSKY, UNDOCUMENTED: HOW IMMIGRATION BECAME ILLEGAL 184 (2014) (noting that "all types of immigration from Latin America rose after 1965: temporary and permanent, legal and illegal"); Ashley Wu, *Why Illegal Border Crossings Are at Sustained Highs*, N.Y. TIMES (Oct. 29, 2023), https://www.nytimes.com/interactive/2023/10/29/us/illegal-border-crossings-data.html (showing that the three years with the greatest number of annual southwestern border apprehensions in the 21st century occurred in 2021, 2022, and 2023).

[73] Jeffrey S. Passel et al., Explaining Why Minority Births Now Outnumber White Births, PEW RSCH. CTR. (May 17, 2012), https://www.pewresearch.org/social-trends/2012/05/17/explaining-why-minority-births-now-outnumber-white-births/ (showing the White and Asian fertility rate at 1.8, the Black rate at 2.1, and the Hispanic rate at 2.4). *See also* Sabrina Tavernise, *Fewer Births Than Deaths Among Whites in Majority of U.S. States*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/us/white-minority-population.html (reporting findings that "[d]eaths began to exceed births for whites countrywide in 2016").

[74] Chin & Spencer, *supra* note 48, at 1242 (citing Press Release, U.S. Census Bureau, U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now (Dec. 12, 2012), https://www.census.gov/newsroom/releases/archives/population/cb12-243.html).

[75] That is, White Americans.

[76] Jeffrey M. Jones, *Sharply More Americans Want to Curb Immigration to U.S.*, GALLUP (July 12, 2024), https://news.gallup.com/poll/647123/sharply-americans-curb-immigration.aspx (showing that from 1965 to the late 1990s, less than 10% of Americans wanted increased levels of immigration, and 55% of Americans now want immigration levels reduced).

by that potential eventuality.[77] Indeed, when the People are informed of demographic statistics and trends, many come to view this process as a "collective existential threat."[78]

What, then, is the substantive legal difference between the demographic change described in the thought experiment above, and the way demographics have actually changed in America? The results of the two will be the same: the People, as once defined, will be replaced, without their consent, with another people—who will then make the electoral decisions[79] and serve as the country's political leaders[80]—via policy decisions (and omissions) by the constituted government. By any means, such a process entails an illegitimate revolution. The only notable differences between reality and the hypothetical are in the degree to which the illegitimate revolution has occurred (Whites becoming a mere minority in 2043 does not necessarily mean they will occupy the same population ratio as outlined in the thought experiment)[81] and the pace of the revolution.

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[77] *See* Jens Manuel Krogstad et al., *Most Americans say the declining share of White people in the U.S. is neither good nor bad for society*, PEW RSCH. CTR. (Aug. 23, 2021), https://www.pewresearch.org/short-reads/2021/08/23/most-americans-say-the-declining-share-of-white-people-in-the-u-s-is-neither-good-nor-bad-for-society/ (finding more than double the number of White Americans explicitly say "White people declining as a share of the U.S. population" is somewhat bad or very bad "for society" than say it is somewhat good or very good); Kim Parker et al., *Looking to the Future, Public Sees an America in Decline on Many Fronts*, PEW RSCH. CTR. (Mar. 21, 2019), https://www.pewresearch.org/social-trends/2019/03/21/public-sees-an-america-in-decline-on-many-fronts/ (reporting that 46% of White Americans "say a majority nonwhite population will weaken American culture" whereas only 23% say it will strength it).

[78] *See* Hui Bai & Christopher M. Federico, *Collective existential threat mediates White population decline's effect on defensive reactions*, 23 GRP. PROCESSES & INTERGROUP RELS. 361, 374 (2019) (reporting findings suggesting that exposure by Whites to information about White population decline "does not merely trigger the threat considered in most studies of demographic change, that is, status threat; . . . it may additionally elicit fears that the ingroup will actually cease to exist").

[79] Non-Whites have a dramatic effect on the electoral results in America. 538's new "Swing-O-Matic" tool allows users to alter various demographics to see how the 2024 election might play out under different conditions. Using data which reflects "vote preference and turnout levels from 2020's matchup between Trump and President Joe Biden, adjusted for demographic shifts since then" one can see that Vice President Kamala Harris would win the election with 303 electoral votes and 51% of the popular vote. However, if turnout levels are changed so that the non-White electorate turns out at the lowest allowable level in the simulator (1%), former President Donald Trump is predicted to win with 326 electoral votes and 54% of the popular vote. On the other hand, if the White turnout is set to 1%, then Vice President Harris would win with an astonishing 507 electoral votes and 67% of the popular vote. *See* Elliot Morris et al., *What Would It Take To Turn Blue/Red States Red/Blue?*, ABC News: 538, https://projects.fivethirtyeight.com/2024-swing-the-election/ (last visited Oct. 23, 2024 9:30 PM).

[80] The 2024 Presidential election featured one such individual, Vice President Kamala Harris, who is the daughter of two non-White immigrants and who was born in this country when neither of her parents were American citizens. However, it is more important to note how the effects of demographic change (and changes in conventional attitudes on race and nationalism) were reflected in the rhetoric of both candidates. *Compare* Vice President Kamala Harris, Democratic Presidential Candidate Acceptance Speech at DNC (Aug. 23, 2024), *in* N.Y. Times, https://www.nytimes.com/2024/08/23/us/politics/kamala-harris-speech-transcript.html (last visited Oct. 23, 2024) (accepting her nomination "on behalf of the people, on behalf of every American, regardless of party, race, gender or the language your grandmother speaks. On behalf of my mother, and everyone who has ever set out on their own unlikely journey."), *with* Former President Donald Trump, Republican Presidential Candidate Acceptance Speech at RNC (July 19, 2024), *in* N.Y. TIMES, https://www.nytimes.com/2024/07/19/us/politics/trump-rnc-speech-transcript.html (last visited Oct. 23, 2024) ("Together, we will launch a new era of safety, prosperity and freedom for citizens of every race, religion, color and creed."). The contrast with the attitudes and views of the candidates in 1924, and other historic American leaders discussed above, is obvious and requires little explanation.

[81] However, there is also no reason to think demographics will become crystallized in 2043. Given differential birth rates, White deaths outpacing births, and increasing levels of immigration, demographic change and replacement will likely continue to accelerate and diminish the White share of the population after 2043.

But one illegality done less dramatically (and more imperceptibly) than another illegality hardly legitimizes the former.

The People still have a valid, inextinguishable claim to sovereignty in our country. More importantly, our numbers and talents are such that—if we are united—we can maintain this sovereignty despite what has transpired and restore ourselves to a position of undisputed control over the constituted power. To do so will obviously require tremendous political efforts, but those efforts are worth it to retain the nation which our Founders bequeathed to us, their posterity. But once this restoration is complete, illegitimate demographic revolutions cannot be permitted to ever again threaten our security and power in our ancestral homeland. To that end, constitutional changes will have to be made.

Restoring Sovereignty to the People – Article V, Section 2

Article V is the proper place for the American Restoration to be given textual validation within the Constitution. Article V, as currently written, should be designated as Article V, Section 1, and a second section should be created which ought to read as such:

> The People are White, and the United States, where they are Sovereign, is their country. It is the affirmative duty of the government to enforce the provisions of this section. Dual and multiple citizenship is prohibited, and everyone possessing dual or multiple citizenship within ninety days of this section going into effect are to be divested of American citizenship. Nothing under this Article, or in any other Article of this Constitution, shall be construed to permit a splintering of the unity of the national territory or a degradation of the homogenous, national character of the sovereign People unless supported by a vote of more than nine tenths of the eligible electorate in a national, popular referendum on enacting an amendment ratified according to the process outlined in Article V, Section 1. The text of this paragraph is perpetual and may not be altered by any means.
>
> All changes heretofore, since this Constitution's enactment, to the homogenous, national character of the sovereign People are hereby deemed *void ab initio* with all attendant consequences flowing from this action being in effect. The Citizenship Clause of the Fourteenth Amendment is repealed, along with the entirety of the Fifteenth Amendment. All references to "person(s)" within this Constitution are to be read as "citizen(s)." All individuals who lose citizenship due to this paragraph, who are currently residing solely in the United States, and have no other national citizenship are hereby granted temporary residency status for a period of ten years, which may be extended as deemed necessary by Congress. The President shall have an absolute right to revoke any such individual's temporary status at any time. Henceforth, no non-citizen who is ineligible for citizenship, upon entering the United States, may reside in the several states for longer than six months in a five-year period.
>
> The referendum vote outlined in the first paragraph of this section is to occur in-person on the day of the second Presidential election following ratification. When referendums occur during these elections, those elections shall be national holidays.

> States may withdraw their approval for ratification at any point until the amendment has been ratified by three fourths of the states. An amendment defeated in the national referendum may not be submitted again for the People's consideration for a period of twenty years. All amendments enacted through this procedure may be nullified according to the procedure outlined in Article V, Section 1.
>
> Deliberate attempts or conspiracies to flagrantly contravene this section, or abuse this provision, may be considered treason against the People, per the Article III, Section 3 procedure, and tried in the Senate or the House of Representatives. The People retain the right to enforce this section, and prevent its abuse, by any means necessary. In any criminal case against a citizen for alleged crimes against any individual having taken an oath under this Constitution, this section and paragraph may be invoked as a defense for a jury to consider. Once invoked, any case held in a venue in the capital district shall be moved to a federal venue in a randomly selected state. This defense may not be withdrawn once asserted, and any individual convicted of any crime after asserting this defense may not appeal their conviction and must be put to death within twenty-four hours after the guilty verdict has been rendered. Whenever this defense is asserted, and the jury cannot reach a unanimous verdict after seven days of deliberation, the jury shall be polled. If a majority of the jury favors acquittal, then the defendant is deemed acquitted. If no majority in favor of acquittal has been reached, deliberation will continue and a new poll will be taken every 72 hours until a majority is reached, a verdict is rendered, or a mistrial is declared.

The amendment process is a necessary aspect of the Constitution. As Albert correctly observes, formal amendment processes and rules bind future political actors, "facilitate improvements or corrections to the constitutional text, . . . heighten public awareness, check political branches, promote democracy, and pacify constitutional change."[82] However, these worthy goals, in particular the goal of promoting "democracy" (by which popular sovereignty is reasonably coterminous), can only be achieved if the amendment process reflects the will of the sovereign People. In the United States, the Article V amendment process does not feature a mechanism for direct popular amendment.[83] Nonetheless, Article V amendments (like ordinary legislation) may reflect the will of the People if the political processes that select representatives (and thereby who may directly participate in the Article V amendment process) accurately reflect their preferences. As explained, improperly restrained demographic change can diminish the power of the People and result in a usurpation of their sovereignty through the introduction of foreigners who cannot be assimilated into the People as defined. Mathematics dictates (and political experience suggests)[84] that, when the franchise is extended to these interlopers, elections will tend to decreasingly reflect the will of the People. Article V, Section 2 aims to block all of this, and thus shore up the important goals of the amendment process generally. Its provisions are not merely

[82] Albert, *supra* note 1, at 230–31.

[83] *See* U.S. Const. art. V; Amar, *supra* note 3, at 90.

[84] *See* Hamilton, *supra* note 42. It should be remembered that the immigrants Hamilton was speaking of here were all legally (i.e., racially) assimilable into the People. Obviously, racially foreign, legally unassimilable peoples would naturally cling to their own identities when faced with a body politic that requires their exclusion as a precondition for its continued homogenous existence.

prophylactic and preservative, but also remedial and restorative. They are also, obviously, quite radical and may, at first glance, seem incoherent. Thus, further detailed explanation is required.

Paragraph 1 of Article V, Section 2

As indicated by the last sentence of this paragraph, the text of this paragraph (and only this paragraph) is permanent and unamendable by any means, reflecting the crucial importance of the provisions of this paragraph to the overarching goals of Article V. The first sentence of the first paragraph of Article V, Section 2 aims to entrench the nationalist view of the American People held by the Founders and generations of succeeding Americans.[85] It also makes popular sovereignty over the United States and its government explicit, a principle which is still nominally accepted in American law.[86] If the People possess the moral confidence to assert their sovereignty, they must also logically assert their right to exist as they define themselves. Similarly, if their Union is to be perpetual,[87] then they themselves must be perpetual. According to Zackin, one of the primary purposes of constitutional entrenchment is "to prevent government from intervening in the ways that it had before."[88] Similarly, the purpose here is to prevent the constituted government from affirmatively facilitating the kinds of changes to the form of the sovereign as it has done since 1868. Preventing these changes being effectuated via omissions is the purpose of the next sentence charging the government with the duty of upholding this section.

This paragraph also permanently abolishes dual and multiple citizenship from the American political landscape. As was demonstrated by the thought experiment, dual and multiple citizenship permits an individual to be subject to the will of two or more governments, and thus, to two or more sovereigns. This may have disastrous results, particularly if a substantial number of people comprising the citizens of one country are also citizens of ours; a situation which would facilitate their coordination on political matters. The potential for subverting and misdirecting the People's sovereign will to advance the ends of an alien entity or people is too great to permit dual or multiple citizenship to exist in the United States.

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[85] One inevitable objection to this provision will be of a practical nature: how does one define "White?" A detailed answer to this question is beyond the scope of this paper. However, two observations are appropriate. First, it is assumed that people are generally able to viscerally recognize the race of most individuals (or at least, they can recognize if they are not White). Secondly, this standard was workable for most of this nation's history. *See generally* IAN HANEY LOPEZ, WHITE BY LAW 2–7 (2006) (describing various court cases aimed at determining if the petitioner was White, and explaining how "[t]hough the courts offered many different rationales to justify the various racial divisions they advanced, two predominated: common knowledge and scientific evidence"). Additionally, the development of artificial intelligence presents one promising means of being able to determine an individual's race. *See generally* Judy Wawira Gichoya et al., *AI recognition of patient race in medical imaging: a modelling study*, 4 LANCET DIGIT. HEALTH e406 (finding "that AI can accurately predict self-reported race, even from corrupted, cropped, and noised medical images, often when clinical experts cannot").

[86] *See supra* note 8.

[87] *See* Texas v. White, 74 U.S. 700, 724–25 (1868) (stating that "[t]he Union of the States never was a purely artificial and arbitrary relation" and that, because "the Constitution was ordained 'to form a more perfect Union'" that Union was "indissoluble" and intended to exist in "perpetuity"), *overruled on other grounds by* Morgan v. United States, 113 U.S. 476 (1885).

[88] EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 34 (2013).

The language of "[n]othing under this Article, or in any other Article of this Constitution" is used to indicate that this paragraph shall be applicable to (and, hopefully, preventative of) informal amendment through legislation, executive order, or judicial interpretation which is contrary to the language of this paragraph.

The purpose of the "splintering . . . of the national territory" language is to entrench the ruling in Texas v. White that the Union is perpetual and indissoluble.[89] Thus, subnational secession is made explicitly unconstitutional, barring the amendment process outlined here. The purpose of the "degradation of the homogenous, national character of the sovereign People" language is to prevent the redefinitions and alterations of the People which have taken place since 1868 barring, again, the amendment process outlined here. That process is, obviously, quite strict. The animating purpose behind the requirement that these amendments receive the support of "more than nine tenths of the eligible electorate in a national, popular referendum" *following* the procedure of Article V, Section 1 is to prevent change and preserve the existing definition of the People. This, again, speaks to the moral confidence which the People must wield to assert and defend their sovereignty. The more than nine tenths requirement reflects the belief that, if such fundamental changes are to be made to the form and composition of the Sovereign, they should receive consensus and some support from "the tenth man;"[90] and the requirement that the nine tenths be of the whole electorate reflects the belief that a failure to explicitly express disapproval does not negate the right of any eligible voter to provide affirmative consent before their nation is fundamentally altered. This requirement also reflects an understanding of (and disdain for) the power of oligarchy, particularly with regards to oligarchy's ability to alter the beliefs of the People, and an awareness of the oligarchical interest in subverting the People and usurping their

[89] *See supra* note 87.

[90] James Dudley, *Incorporating the 'tenth man' concept into critical decision-making*, POLICE1 (June 15, 2021, 10:04 AM), https://www.police1.com/chiefs-sheriffs/articles/incorporating-the-tenth-man-concept-into-critical-decision-making-TXuMkB74BZFN9LCo/ (describing a "devil's advocate" tactic to bring "alternative perspectives to problem-solving" whereby, in a group that has reached consensus, "[t]he role of the tenth man is to review available intelligence to then articulate opposing arguments to whatever solutions or decisions are being proposed. By considering the tenth man's perspective, information or scenarios that may otherwise be overlooked and unanticipated may be revealed.").

sovereignty.[91] Moreover, this requirement promotes democracy by incentivizing the political forces behind a suggested amendment of this type to ensure widespread voting access.[92]

Paragraph 2 of Article V, Section 2

The purpose of the first sentence of this paragraph is to reverse the changes to the American national character which have occurred since 1868. Thus, the citizenship of everyone who would have been unable to attain it via naturalization under the 1790 standard is to be rescinded. Moreover, because the Citizenship Clause of the Fourteenth Amendment redefined, without the consent of the People, what it meant to be born as a member of the People, that clause is to be repealed. By tying birthright citizenship to being born on American soil, rather than being born with American blood, the Reconstruction era Congress effectuated a grossly anti-nationalist policy which fundamentally degraded the homogenous, national character of the sovereign People. As Daniel O'Connell said, "being born in a stable does not make a man a horse;"[93] and, likewise,

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[91] *See* Winters & Page, *supra* note 21, at 743 (discussing how "shrewdly invested money can move public opinion in directions inimical to citizens' interests" and how "[t]his is particularly likely to happen when elite communications are monolithic, which might well occur . . . on issues of central concern to an oligarchy"). *See also* ARISTOTLE, POLITICS bk. 5, sec. 1314a ("And it is a mark of a tyrant to have men of foreign extraction rather than citizens as guests at table and companions, feeling that citizens are hostile but strangers make no claim against him."); Alexander W. Schmidt-Catran & Christian S. Czymara, *Political elite discourses polarize attitudes toward immigration along ideological lines: A comparative longitudinal analysis of Europe in the twenty-first century*, 49 J. ETHNIC & MIGRATION STUD. 85 (2023) ("When political elites in a country become more positive on immigration-related issues, Europeans—on average—tend to be more open as well."). One minority group that has exercised outsized influence over the process of demographic change in the United States is its Jewish community. *See generally* Kevin MacDonald, *Jewish Involvement in Shaping American Immigration Policy, 1881-1965: A Historical Review*, 19 POPULATION & ENV'T 295 (1998) (explaining why "Jews have been at the forefront in supporting movements aimed at altering the ethnic status quo in the United States in favor of immigration of non-European peoples" through "activities [which] have involved leadership in Congress, organizing and funding anti-restrictionist groups composed of Jews and gentiles, and originating intellectual movements opposed to evolutionary and biological perspectives in the social sciences"). It is also widely acknowledged that the donor class is disproportionately comprised of Jews, and that Jews wield outsized influence within media to influence social change. *See* Ron Kampeas, *Meet the leading Jewish political donors in this US election cycle*, TIMES OF ISRAEL (Sept. 25, 2020, 5:59 PM), https://www.timesofisrael.com/meet-the-leading-jewish-political-donors-in-this-us-election-cycle/ (showing how seven of the top ten and fifteen of the top twenty-five individual donors in the 2020 U.S. election cycle were Jews, with donation totals of roughly $176.4 million to Democratic groups and $87.9 million to Republican groups); Jeremy Sharon, *US Jews contribute half of all donations to the Democratic Party*, JERUSALEM POST (Sept. 27, 2016, 12:31 AM), (describing why Jews contribute "a whopping 50% of funds received by the Democratic Party and 25% to the Republican Party"); Joel Stein, *Who Runs Hollywood? C'mon*, L.A. TIMES (Dec. 19, 2008, (12:00 AM), https://www.latimes.com/archives/la-xpm-2008-dec-19-oe-stein19-story.html (describing how the author had to "scour the trades" of Hollywood "to come up with six Gentiles in high positions at entertainment companies," and when he called these six people "five of them refused to talk . . ., apparently out of fear of insulting Jews. The sixth, AMC President Charlie Collier, turned out to be Jewish."); Josh Lederman, *Biden: Jewish leaders drove gay marriage changes*, ASSOC. PRESS (May 21, 2013, 9:21 PM), https://apnews.com/arts-and-entertainment-movies-united-states-government-974f8e9179014185a6f1d455005539af (reporting how then Vice President Biden "prais[ed] Jewish leaders for helping change American attitudes about gay marriage and other issues" through their "immense" influence in Hollywood and social media companies).

[92] On the other hand, it may be countered that this requirement also risks incentivizing *the opponents* of such an amendment to *restrict* voting access. This is accurate, but given that the purpose of these requirements is to prevent change, this is an acceptable risk. Moreover, if such an amendment truly had the support of the necessary fraction of the total electorate, I doubt such attempts at frustrating the will of the nearly unanimous People could bear fruit.

[93] Raphaël Ingelbien, *"When I say 'We', I mean what I say": The "national" receptions of Waterloo in 19th-century Ireland*, 20 INTERFÉRENCES LITTÉRAIRES/LITERAIRE INTERFERENTIES 31, 33 (2017).

merely being born in the United States is not enough to make a man an American. Madison spoke of "the kindred blood which flows in the veins of American citizens"[94] to spur them to ratify the Constitution, he did not speak of their kindred birthplaces.

Little explanation of the rationale behind the repeal of the Fifteenth Amendment is needed. If "[t]he People are White, and the United States, where they are sovereign, is their country" is to be a constitutional provision, then racial discrimination in voting rights is not only permissible, but incumbent upon the government. Obviously then, the Fifteenth Amendment cannot coexist with this section.

The repealing of both the Citizenship Clause of the Fourteenth Amendment and the Fifteenth Amendment should also be done to return dignity to Article V, Section 1. Suthon Jr. convincingly argues that placing the Southern states under military occupation, forcefully reorganizing their governments, and demanding their "puppet" state legislatures to ratify these amendments as conditions for having their elected Representatives and Senators allowed into Congress "constitute[d] an infraction of the amendment procedure ordained by Article V of the Constitution."[95] Nonetheless, only the Citizenship Clause of the Fourteenth Amendment is objectionable from a nationalist standpoint once the sentence mandating reinterpretation of the word "person(s)" as "citizen(s)" is added. Indeed, once the meaning of the word "person(s)" is thus circumscribed (and the Citizenship Clause deleted) the remainder of the Fourteenth Amendment is actually quite nationalistic insofar as it ensures that we remain "one people" with "each individual citizen everywhere enjoying the same national rights, privileges, and protection."[96] Such a redefinition is also not incompatible with the goal of government under popular sovereignty.[97]

The "temporary residency status" provision is intended to make the changes effectuated by this section more politically palatable and logistically manageable. The purpose of the Presidential veto provision is to permit the acceleration of this process when such acceleration is feasible, and to allow the President to remove troublesome non-citizen elements if he deems it necessary. Additionally, constitutionalizing residency restrictions is designed to prevent Congress from maintaining and introducing a permanent and politically problematic underclass. The ultimate goal of these three provisions is to provide constitutional guidelines and requirements for the deportation of those with the ten-year temporary status to their ancestral homeland, or to another country that is willing to accept them. [98] Of course, the ten-year timeframe will also provide the necessary time to ratify and pass all amendments pursuant to this section which the People may desire in order to legitimately accept and integrate those with this ten-year status into the People.

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[94] THE FEDERALIST NO. 14, *supra* note 29, at 104.

[95] *See generally* Walter J. Suthon Jr., *Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22, 41–44 (1953). *See also id*. at 29 (contrasting this process with the regular process used to ratify the Thirteenth Amendment).

[96] THE FEDERALIST NO. 2, *supra* note 5, at 38–39.

[97] *See e.g.,* League v. De Young, 52 U.S. 185, 203 (1850) ("The Constitution of the United States was made by, and for the protection of, the people of the United States.").

[98] To believe these should not be policy goals, given the rest of Article V, Section 2, would be to sanction the creation of a large, disenfranchised, and permanent underclass of those constitutionally unable to become citizens. In many ways, this is to sanction a return to the antebellum living arrangement between Whites and non-Whites, with all the constant, simmering (and occasionally explosive) racial antagonism that entails. Repatriation is a superior policy.

Paragraph 3 of Article V, Section 2

Whether or not Ackerman is correct regarding "the plebiscitarian presidency" as a historical fact,[99] the intent behind tying the referendum vote on Article V, Section 2 amendments to the second presidential election following their ratification is, essentially, to demand a plebiscitarian presidential *election* to ensure a national conversation occurs around the merits (or lack thereof) of these amendments. In tying the vote to the second presidential election following ratification, the People will have four years at minimum to have this conversation and carefully consider the political question presented by the amendment. Of course, such an amendment is bound to be a major question, and candidates will be expected to clearly state their opinion on the matter. Moreover, given the nine tenths threshold and the significance of the question which these amendments bring to the national forefront, common sense suggests that (in a two-party system) *both* candidates will likely, although not necessarily, need to passionately support the amendment for it to pass.[100] Finally, tying the referendum to the presidential election ensures that no additional election infrastructure needs to be established; and the requirement that the referendum vote be in-person on election day is intended to prevent fraud and having votes be cast by insufficiently motivated voters. The provision that these referendum votes shall occur on a national holiday is intended to ensure there is no excuse (aside from one's personal choice to essentially vote no on the amendment) for failure to vote in the referendum.

The provision that states may withdraw their ratification until the three fourths threshold of states is reached is intended to permit the citizens of the several states to depose incumbent state legislators who ratify an amendment contrary to the democratic will without also having to risk (or bother with) a national referendum. The time limit on resubmitting an amendment after its defeat is intended to show respect to the People's will; when the People decide, they should not be incessantly prodded on the same issue until they relent.

Finally, this paragraph's provision that an Article V, Section 2 amendment may be nullified according to the procedure outlined in Article V, Section 1 is intended to permit the People's representatives to exercise their judgment and return the nation to the *status quo ante* without the need to go through the process outlined in this section. This provision reflects the assumption that a return to the *status quo ante* on the questions involved in Article V, Section 2 amendments is an inherently acceptable position to the Sovereign. This is an assumption that is essentially restorationist.

Paragraph 4 of Article V, Section 2

The purpose of this paragraph is to provide a legal means of legitimizing political violence against usurpers within the government. The provision allowing for "[d]eliberate attempts or conspiracies to flagrantly contravene this section, or abuse this provision," to be charged as treason permits for this violence to occur through normal government through a trial, similar to how Article

[99] *See generally* Ackerman, *supra* note 60, at 1757–71 (describing his theory of a "movement-party-presidency pattern" traceable back to Jefferson that has "filled the void left in the public mind by the marginalization of the formal Article V system," with a special emphasis on this theory's relation to the "the civil rights revolution").

[100] On the ballot, the amendment vote will be separate from the presidential vote. It is theoretically possible for both candidates to support an amendment and to have that amendment fail, or for both to oppose the amendment and have it pass.

V, Section 1 permits amendment through normal government.[101] The language of "[d]eliberate" and "flagrantly" is used to qualify the elements of the crime so that this provision does not provide cover for attempts by members of either chamber to punish various political opponents. The ability for charges to be tried in either chamber is meant to ensure that the chambers can serve as a check on one another.

Crucially, this paragraph also allows the People "to enforce this section, and prevent its abuse, by any means necessary." This language is motivated by the theory that, just as "an assassin's bullet" may cause constitutional change,[102] so too may it prevent illegitimate change. Assassination is undoubtedly an extralegal action, however, to call an action extralegal does not necessarily imply that it is illegitimate.[103] The purpose of the remaining provisions of this paragraph which allow the assassin to invoke this section and paragraph "as a defense for a jury to consider," and describe some procedures by which a trial is to be conducted after this defense is asserted, is to determine whether the assassination is legitimate. Thus, this provision does not permit trial by combat; rather, it permits trial *of* combat while presuming that the mere fact that a defendant committed extralegal violence does not necessarily mean they are guilty of a crime. Moreover, this provision will be useful in providing a practical check on the power of the judiciary, whose members (due to being unelected and serving for life) are generally unaccountable within the political process, absent impeachment and conviction. The United States was not intended to be a kritarchy, and by providing a legal mechanism for removing judges from the bench, this provision hopes to remind judges of their impotence, so that they may rule accordingly.[104]

The remaining procedural provisions of this paragraph reflect three different concerns. First, it is envisioned that it may be difficult to find an impartial jury to consider this defense for violent acts committed against officials in the capital district. The reason for moving the trial to a random venue is to provide the neutrality and fairness of pure chance to both the defendant and the government. Second, the provision preventing withdrawal of the defense once asserted, and the unappealable, mandatory, and swift death penalty following a guilty verdict, reflects the seriousness with which these extralegal actions should be contemplated by those who would commit them, and the gravity of the consequences a defendant should face if their actions are deemed illegitimate by a jury of the People. Finally, the mandatory acquittal after seven days of deadlocked deliberation if a majority of the jury favors acquittal and the continuous polling every 72 hours, reflects concern with the squeamishness towards the use of violence by the average person. Individuals may find it difficult to accept that it may be, depending on the circumstances, necessary for (or beneficial towards) national survival to kill certain officials. Thus, after a week of deliberations, only a majority in favor of acquittal should be necessary to free a defendant.

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[101] *Cf. supra* note 83.

[102] Ackerman, *supra* note 60, at 1770.

[103] *See* Albert, *supra* note 1, at 232 ("To call informal amendment extralegal is not to make a claim about its legitimacy.").

[104] *See* Obergefell v. Hodges, 576 U.S. 644, 720 (2015) (Scalia, J., dissenting) ("With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court—we move one step closer to being reminded of our impotence.")

In 1787, Thomas Jefferson wrote that, "[t]he tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."[105] Relatedly, Alexander Hamilton wrote of the necessity of fostering "a large body of citizens, little, if at all, inferior to [the standing army] in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens."[106] Given Founders who held such sentiments, it is hardly surprising that the Second Amendment, in order to provide for "the security of a free State," demands that "the right of the people to keep and bear Arms, shall not be infringed."[107] Recognizing this heritage, and the validity of these sentiments, this paragraph provides the People with textual basis for—and procedural vindication of—the right to not merely keep and bear arms, but to use those arms to defend their panoply of rights. Threats to the sovereign People do not only come from the realm of demographic change. In a republic, one of the greatest threats to popular sovereignty and liberty is the ambition of the People's elected leaders. No patriot should be expected to stand idly by while this ambition—and its concomitant avariciousness and lust for power—drives a nation into ruin. This paragraph gives the assassin the right to justify himself and to inquire of the People who among them is so base that would be a bondman, so vile that will not love their country. Then, he shall pause for a reply.[108]

Conclusion

One potential objection to these arguments and proposals is that the historical narrative upon which they rely was always a historical fiction. It may be convincingly argued that the People were never a homogeneous mass,[109] or that they did not act in a recognizably sovereign capacity to create the Constitution.[110] However, these arguments, as accurate as they may be as a matter of history, are irrelevant for legal purposes. Although the homogeneity of the early United States or the genuine sovereignty of the People, may have been a historical fiction, the ratification of the Constitution—done through a political process which appealed to these assumptions to garner support—made these assumptions, fictitious or otherwise, binding. If these historical assumptions were (or are) fictions, then ratification transformed them into *legal fictions*.

For better or worse, history is an unalterable inheritance. We can no more change history than we can change the orientation or intensity of the stars in the night sky. It is also true that, like those stars, history may position and guide us. Our Constitution, and the fundamental principles it embodies, is one such guiding historical inheritance. However, unlike history or the stars, we can change the Constitution; as a practical matter, we can do away with part or all of it as we wish, provided we have the will and the power to do so. Nonetheless, we seem to abide by it (or at least,

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[105] Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON, Aug. 7, 1787–Mar. 31, 1788, at 355 (Julian P. Boyd, ed., Princeton University Press 1955), https://founders.archives.gov/documents/Jefferson/01-12-02-0348.

[106] THE FEDERALIST NO. 29, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1961)

[107] U.S. CONST. amend. II.

[108] WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2, ll. 1563–68.

[109] Sanford Levinson, *Federalist No. 2*, SLATE (Nov. 24, 2015 10:02 AM), https://www.slate.com/articles/news_and_politics/history/2015/11/the_federalist_papers_federalist_no_2_and_the_immigration_debate.html (arguing that, as a matter of "historical truth," Jay's statements in Federalist No. 2 that Americans were a homogeneous nation amount to "utter fatuity").

[110] *See generally* CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913) (arguing that the Constitution was the self-interested creation of an elite economic class).

pretend like we abide by it) in large part because we have respect for the history that formed it and delivered it to us in the present. Like the man of wealth and prudence who has inherited a luxurious mansion in which his family has lived for generations, and who tempers his exuberance and his desire to tear the whole thing down and build something else in its stead so that he may deliver his abode to his descendants, we resist throwing out our Constitution. We thus say that we limit ourselves to making relatively small and incremental changes which do not dramatically change the character of the whole document and the government which it gives authority to.

But as this paper demonstrates, the Constitution has effectively been thrown out. Through the demographic and constitutional changes effected by our government, the Constitution's overarching principle—the sovereignty of the People (as once understood)—is now a dead letter. When Chin & Finkelman argue that the 1790 Naturalization Act "deserves a place of dishonor,"[111] what they are essentially saying is that the founding of the United States deserves a place of dishonor. Many non-Whites may agree with that proposition, and they may feel joyful that the government of the United States has usurped the People's sovereignty. After all, without this usurpation, non-Whites may not have ever been permitted to become citizens of this country. But what extraneous costs will come from this change? If the government has usurped sovereignty from the People and reconstituted them into a new people, will sovereignty pass to that new people? Furthermore, if the racial attitudes of the Founders which brought White nationalism in to force in the United States are merely a bygone relic of an age that should be forgotten—nay, dishonored!—then why should the government respect any other provision or structural principle of the Constitution? Why should the Founders' concern with the Crown's restriction on their free speech give legitimacy to the First Amendment? Why should their hatred of general warrants give legitimacy to the Fourth Amendment? Why should their fear of the thumbscrew and the breaking wheel give legitimacy to the Fifth and Eighth Amendments? And if that legitimacy comes not from the history of this country and the Founders, then where will it be found? At minimum, those who seek to uphold the current constitutional order should acknowledge that a usurpation has occurred. Only when honesty is forthcoming on this crucial matter can the new people in America begin to determine the extents to which this usurpation has gone (and will go), and begin to trust that this usurpation will only go so far.

[111] Chin & Finkelman, *supra* note 41, at 1048.